

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0245-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
RENE ANTONIO FELIX,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20013641

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Rene Antonio Felix

Buckeye
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Rene Felix seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear

abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Felix has not sustained his burden of establishing such abuse here.

¶2 After a jury trial, Felix was convicted of two counts each of armed robbery, aggravated assault with a deadly weapon or dangerous instrument, and kidnapping, and one count of first-degree burglary. The trial court imposed aggravated, consecutive and concurrent prison sentences, totaling thirty-four years. This court affirmed his convictions and sentences on appeal. *State v. Felix*, No. 2 CA-CR 2002-0376 (memorandum decision filed Sept. 10, 2003). Thereafter, Felix initiated his first Rule 32 proceeding, seeking relief under *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court denied relief, concluding Felix’s conviction had been final when *Blakely* was decided. We granted review of Felix’s petition for review, but denied relief on the same grounds. *State v. Felix*, No. 2 CA-CR 2005-0394-PR (memorandum decision filed May 11, 2006).

¶3 More than four years later, Felix again initiated post-conviction relief proceedings, indicating in his notice of post-conviction relief that he was seeking relief pursuant to Rule 32.1(g), which provides relief on the basis of a significant change in the law. In his petition for post-conviction relief, however, he maintained (1) he had received ineffective assistance of counsel at sentencing, (2) his rights against cruel and unusual punishment had been violated by the use at sentencing of “historical prior convictions which were in excess of five years” old, (3) the prior convictions had not been proven beyond a reasonable doubt, and (4) his sentences should have been concurrent, not consecutive. The trial court deemed these arguments precluded pursuant to Rule 32.2(a) because they were first raised in his second petition for post-conviction relief. In his final argument in the petition, Felix asserted that *State v. Price*, 217 Ariz. 182, 171 P.3d 1223

(2007) and *State v. Schmidt*, 220 Ariz. 563, 208 P.3d 214 (2009), constituted a significant change in the law that “would probably overturn the conviction or sentence.” The trial court summarily denied relief on these claims as well.¹

¶4 To the extent we understand Felix’s petition on review, he apparently asserts essentially the same arguments made below. But, we agree with the trial court that most of Felix’s claims are precluded by his failure to raise them either on appeal or in his first petition for post-conviction relief. Ariz. R. Crim. P. 32.2(a)(3). His claims asserted under Rule 32.1(g), although exempt from preclusion under Rule 32.2(b), are without merit.

¶5 In *Price*, our supreme court relied on *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to hold that a trial court had erred in imposing an aggravated sentence based on its own finding that a defendant was “a danger to the community.” 217 Ariz. 182, ¶¶ 14, 16, 21, 171 P.3d at 1226-28. In a concurring opinion that since has been adopted by our supreme court, *see Schmidt*, 220 Ariz. 563, ¶¶ 9-11, 208 P.3d at 217, Justice Hurwitz questioned whether, consistent with the due process requirement that advance notice be given of conduct that constitutes the elements of a crime, a court may “constitutionally employ only an unenumerated aggravating circumstance under the ‘catch-all’ provision in former A.R.S. § 13-702(C)(18) (2001) to impose a sentence in

¹After the trial court denied his petition, Felix filed another document entitled “Petition for Post Conviction Relief” in which he requested appointment of counsel and informed the court he had been relocated to another prison unit and therefore had been unable to comply with the extended deadline the court had set for his petition to the court. The court denied the request for counsel as well as Felix’s request for a further extension of time. Felix nonetheless petitioned this court for review, and we dismissed the petition as untimely. Felix again moved the trial court for an extension of time to file his petition for review, and the court granted that motion, making his earlier petition timely.

excess of the statutory presumptive term.” *Price*, 217 Ariz. 182, ¶¶ 24, 27-29, 171 P.3d at 1228-29 (Hurwitz, J., concurring).

¶6 Even assuming the sentence here was imposed in a manner inconsistent with *Schmidt*, our supreme court’s decision therein is premised on *Blakely* and *Apprendi*, see *Schmidt*, 220 Ariz. 563, ¶¶ 6-7, 208 P.3d at 216-17, and we agree with the trial court the benefits of those decisions are unavailable to a defendant whose conviction was final before *Blakely* was decided. If, as we concluded in Felix’s first petition for post-conviction relief, *Felix*, No. 2 CA-CR 2005-0394-PR, ¶ 6, *Blakely* is not applicable retroactively to convictions that, like Felix’s, already had become final, see *State v. Febles*, 210 Ariz. 589, ¶ 17, 115 P.3d 629, 635 (App. 2005), it would be anomalous to nevertheless conclude that *Schmidt*, as *Blakely*’s progeny, would apply retroactively to Felix’s sentence. Therefore, although we grant the petition for review, relief is denied.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge